In the High Court of Judicature at Madras

Dated : 02..12..2006

C O R A M

The Honourable Mrs. Justice Prabha Sridevan

Writ Petition Nos.23581 to 23584 of 2006

Selvi J. Jayalalitha .. Petitioner in W.P. No.23581 of 2006

V.K. Sasikala,
" Veda Nilayam:,
81, Poes Garden,
Chennai - 600 086. .. Petitioner in W.P. No.23582 of 2006

M/s. Sasi Enterprises,
14, Parsn Manere,
602, Anna Salai,
Chennai-6, rep. by its Partner V.K. Sasikala. .. Petitioner in W.P. Nos. 23583 and 23584 of 2006

Versus

1. The Union of India,
   Rep. by its Secretary,
   Finance Department,
   North Block,
   New Delhi-110 001.

2. The Commissioner of Income Tax,
   Central Circle II(2),
   Chennai-34.

3. The Asst. Commissioner of Income Tax,
   Central Circle II(2),
   Chennai-34. .. Respondents in all the Writ Petitions

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Prayer : Writ Petitions filed under Article 226 of the Constitution of India seeking to issue writs of declaration to declare that Section 278E of the Income Tax Act, 1961 is ultra vires, illegal, unreasonable and unconstitutional, repugnant to the Constitution of India.

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For Petitioners : Mr. Guru Krishnakumar and
Mr. Subramanium Prasad for
Mr. N. Jothi, Assisted by
Mr. L.P. Shanmugha Sundaram,
Mr. A. Kandasamy and
Mr. V. Karthikeyan.

For Respondents : Mr. Gopal Subramaniam,
Additional Solicitor General of India,
Assisted by Mr. K. Ramasamy,
Senior Public Prosecutor for I.T. Cases,
Mr. S. Rajappa and
Mr. P. Wilson, Asst. Solicitor General of India.

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O R D E R

The writ petitioners challenge the constitutional validity of Section 278E of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. The petitioners are facing prosecution before the Additional Chief Metropolitan Magistrate (E.O. I), Egmore, Chennai-8 for the offence under Section 276CC of the Act. The case of the petitioners is that, the expression 'wilfully' occurring in Section 278E of the Act indicates the *mens rea* element. This is the basis for the prosecution. Therefore, the prosecution is bound to prove the existence of *mens rea* on the part of the accused, beyond reasonable doubt. However, by introduction of Section 278E, which gives rise to a presumption as to the culpable mental state of the accused, the entire basis of accusatorial jurisprudence, as accepted and recognised in India, has been shifted. The petitioners contend that while having to defend a wholly baseless and vexatious criminal proceedings, they are also expected to discharge the burden of not possessing the criminal intent and proving it beyond reasonable doubt. According to the petitioners, the impugned provision violates Article 21 of the Constitution of India and their right to pray for discharge from the criminal proceedings has been negated merely on the basis of the impugned provision. According to the petitioners, the guarantee against self-incrimination protected by Article 20(3) of the Constitution has also been taken away from them.

3. The following grounds are raised by the petitioners :

(1) The procedure established by law must be just, fair and reasonable and not arbitrary, fanciful or oppressive. By shifting the burden of proving absence of culpable mental state on to the accused and requiring the same to be established beyond reasonable doubt, the rights guaranteed by the Constitution under Article 21 are violated.

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(2) The impugned provision runs counter to the well recognised principles of accusatorial system which requires the prosecution to establish the culpable mental state beyond reasonable doubt.

(3) The provisions of the Indian Evidence Act relating to the manner of proving facts and the burden of proof establish clearly what the duty of the prosecution is with regard to establishing *mens rea* and presumption of innocence of the accused, and even where the onus is placed on the accused, it is only to prove it by a preponderance of probabilities and not to prove it beyond reasonable doubt. Even Section 108 of the Indian Evidence Act does not abrogate the well established rule of criminal law which places the burden on the prosecution to prove its case.

(4) The presumption under Section 114 of the Indian Evidence Act must be seen in the background of common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

(5) The requirement of *mens rea* is a constituent part of a crime unless and until a statute excludes it.

(6) Even where a statute provides for certain presumptions, the onus is to be discharged only on a balance of probabilities and not beyond reasonable doubt.

(7) The requirement of proportionality and reasonableness as regards legislative action has not been met and there is failure to follow the principle of proportionality as formulated by the Supreme Court in Om Kumar vs. Union of India [(2001) 2 S.C.C. 386]. According to the learned counsel for the petitioners, this decision would show that Courts should determine, while considering the *vires* of a provision, whether the choice of the legislature excessively infringes the rights of the individual. Further, the principle of reasonableness, which is a basic feature of the Indian Constitution, as laid down by the Supreme Court in 2006 (10) SCALE 301 [M. Nagaraj vs. Union of India] has also been ignored.

(8) The extent to which "reverse burden" can operate has been well delineated by the decisions of Courts elsewhere in the world, and these parameters have been exceeded.

(9) The expression 'beyond reasonable doubt' is an undefined term and as such, an accused would not be able to understand the standard to be met, whereas crimes must be defined with appropriate definiteness and certainty and any infraction thereof directly dilutes the reasonableness of the legislation.

(10) The impugned provision is susceptible to rampant misuse and a policy of 'pick and choose' by the prosecution.

(11) The impugned provision is excessive since it applies to all offences under the Act, whereas the Statement of Objects and Reasons shows that it was intended to apply only to cases of evasion of tax.

(12) The impugned provision offends the constitutionally guaranteed protection against self-incrimination.

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(13) The impugned provision also has the effect of rendering statutory remedies available to the accused illusory.

(14) One cannot label a statute as one dealing with a grave social evil and from that, to infer strict liability - *vide* Lim Chin Aik vs. The Queen [(1963) A.C. 160]; that Courts should be slow to infer that Parliament intended to impose an onerous duty on the accused – *vide* R. v. Hunt [(1987) 1 All ER 1]; and that the ultimate test of constitutional validity is whether the device undermines the fact finder's responsibility – *vide* County Court Ulster, New York vs. Samuel Allen [60 L. Ed. 2d. 777].

4. Briefly stated, the facts of the case are as follows :

The petitioner in W.P. No.23581 of 2006 (hereinafter referred to as 'the first petitioner') was required to file return of income for the Assessment Year 1993-94 under Section 139(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') by 31st August, 1993. The first petitioner failed to furnish the return of income. A notice was sent to the first petitioner under Section 142(1) on 18.1.1994, calling upon her to file the return of income within a period of 30 days from the date of service of the notice. This notice was served on the first petitioner on 19.1.1994. The period of 30 days expired, but no return was filed in compliance to the notice. Reminders were sent on 22.8.1994, 10.2.1995 and 23.8.1995, yet the return was not filed. Subsequently, a notice under Section 142(1)(ii) of the Act was issued on 31.7.1995, calling upon the first petitioner to produce the accounts since as per the Act, assessments need to be completed by March 31, 1996. The first petitioner failed to furnish the return of income and also failed to comply with the statutory notice. A best judgment assessment was completed under Section 144 of the Act on 9.2.1996 and penalty proceedings for concealment of income were initiated under Section 271(1)(c) of the Act. Penalty proceedings were also initiated for non-compliance of the notice under Section 271(1)(b) of the Act. A demand inclusive of interest was made. The first petitioner challenged the assessment order before the Commissioner of Income Tax (Appeals). This appeal was partly allowed by order dated 28.2.1997. The department has challenged that order in Appeal No.1239 of 1997. The first petitioner has also challenged that order. Both the Appeals are pending. On 14.10.1996, complaints were filed against the first petitioner and the other petitioners for the offence under Section 276CC of the Act. Thereafter, there have been several proceedings initiated at the instance of the first petitioner before the Magistrate Court and also before the High Court. It is not necessary for the purpose of deciding these writ petitions to refer to all of them in detail or to refer to the facts in each case, since they are more or less similar.

5. On 12.5.2004, an application under Section 313 of the Code of Criminal Procedure was filed by the respondents for examining the first petitioner. On the same day, the first petitioner filed an application under Section 245 of the Code for discharging her from the prosecution

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proceedings. Other petitions were also filed. The respondents filed petitions before this Court for a direction to the trial court to frame charges against the petitioners. The petitioners filed application under Section 482 of the Code to quash the proceedings. The petitions filed by the respondents were dismissed by this Court. Against this, the department filed Special Leave Petitions, which were disposed of by the Supreme Court, directing the trial court to consider the matter regarding framing of charge, after hearing the parties on the petition for discharge, within a period of two months. Thereafter, the trial Magistrate dismissed the discharge petitions and fixed the date for commencement of hearing as per the directions of the Supreme Court. The Magistrate directed the accused to be present in Court on 25.8.2006. The first petitioner has filed criminal revisions against the dismissal of the discharge petition and has also filed the present writ petition challenging the constitutional validity of Section 278E of the Act.

6. Mr. Guru Krishnakumar, learned counsel appearing for the petitioners and Mr. Gopal Subramaniam, learned Additional Solicitor General of India appearing for the respondents made very detailed submissions and also submitted their written arguments, followed by supplementary arguments.

7. Mr. Guru Krishnakumar, learned counsel appearing on behalf of the petitioners submitted that the impugned provision violates Article 21 of the Constitution and in actual operation, it is arbitrary and therefore, it affects Article 14 of the Constitution and further, it also suffers from the vice of vagueness. Learned counsel also submitted that, when Section 276CC of the Act specifically mentions the word 'wilfully', this is rendered otiose by the introduction of Section 278E, which presumes a culpable mental state, namely willfulness. Learned counsel submitted that the impugned provision lacks guidelines and therefore, it is capable of misuse, untramelled as it is, by reasonable parameters. According to the learned counsel, Section 278E was not intended to be applied to Section 276CC. On facts, the learned counsel submitted that in two cases, there was no provision for imposing penalty at all and therefore, the launching of criminal proceedings itself is without jurisdiction.

8. Learned counsel referred to the following question raised in (1978) 1 S.C.C. 248 [Maneka Gandhi vs. Union of India] to show the inter-relation between Article 14 and Article 21 :

> *"Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable?"*

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It was submitted that the Fundamental Rights weave a pattern of guarantees on the basic structure of human rights, and when the constitutionality of a provision is challenged, it must be tested against the whole gamut of Fundamental Rights and if so tested as per the law laid down in the above case, the impugned provision must necessarily be struck down as arbitrary, capricious, oppressive and unfair.

9. Learned counsel submitted that if the petitioners were burdened with the duty to prove beyond reasonable doubt that their failure to file the returns was not wilful, then they may have to produce documents which may indict them at the time of trial and therefore, it offends Article 20 (3) of the Constitution. For this purpose, he relied on A.I.R. 1961 S.C. 1808 [State of Bombay vs. Kathi Kalu Oghad], the Supreme Court held as follows :

> *"..... In view of these considerations, we have come to the following conclusions :-*
>
> *'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise."*

10. Learned counsel pointed out that Section 4 of the Indian Evidence Act, 1872 defines the word 'proved', and for an accused to prove the existence of the exception given under Section 105 of the Act, he is only expected to prove it on a preponderance of probabilities, i.e., it is sufficient if the accused proves the existence of those circumstances as so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To support this (1964) 7 S.C.C. 361 [Dahyabhali Chhaganbhai Thakker vs. State of Gujarat], K.M. Nanavathi vs. State of Maharashtra [(1962) Supp. 1 S.C.R. 567] were relied on.

11. Learned counsel submitted that there is no willfulness on the part of the petitioners for non-filing of the accounts, and as observed by the Supreme Court of the United States in W.D. Manley vs. State of Georgia [73 L.Ed. 575], mere legislative fiat may not take the place of fact where life and liberty of individuals are involved, and also that a statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Constitution. Learned counsel submitted that Section 278E has been so engrafted as to bring in a burden heavier than what is laid down in Section 106 of the Indian Evidence Act. Learned counsel raised the following questions :

(a) What does the phrase 'beyond reasonable doubt' mean?
(b) If this is unclear, can the Section stand the test of constitutionality?

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12. A number of decisions were cited by the learned counsel for the petitioners to support the above submissions. The decisions are enumerated hereunder :

1956 S.C.R. 199
[Shambhu Nath Mehra vs. State of Ajmer]

1965 (3) S.C.R. 235
[Harbhajan Singh vs. State of Punjab]

1966 (3) S.C.C. 736
[V.D. Jhingan vs. State of Uttar Pradesh]

(1972) 3 S.C.C. 22
[Dr. S.L. Goswami vs. State of Madhya Pradesh]

(1973) 2 S.C.C. 808
[Kaliram vs. State of Himachal Pradesh]

(1978) 1 S.C.C. 248
[Maneka Gandhi vs. Union of India]

(1981) 3 S.C.C. 199
[State of Maharashtra vs. Wasudeo Ramchandra Kadalwar]

(1982) 1 S.C.C. 271
[A.K. Roy vs. Union of India]

1995 Supp. (2) S.C.C. 187
[P.N. Krishna Lal vs. Government of Kerala]

(1999) 6 S.C.C. 172
[State of Punjab vs. Baldev Singh]

(2005)1 S.C.C. 496
[District Registrar & Collector, Hyderabad vs. Canara Bank]

254 I.T.R. 292 (Delhi)
[R.L. Sahni vs. R. Singh]

(2005) 10 S.C.C. 451
[Gurunanak Enterprises vs. I.T.O.]

1988 (173) I.T.R. 554
[Gopalji Shaw vs. I.T.O.]

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225 I.T.R. 509
[Bhuvaneshwar Prasad vs. State of Bihar]

(2004) 2 S.C.C. 731
[K.C. Builders vs. C.I.T.]

151 I.T.R. 723
[Smt. Prem Lata vs. I.T.O.]

154 I.T.R. 227
[Murari Lal vs. I.T.O.]

205 I.T.R. 176
[Tmt. Thangalakshmi vs. I.T.O.]

(2003) 9 S.C.C. 700
[R. Balakrishna Pillai vs. State of Kerala]

1951 S.C.R. 322
[Ravula Hariprasada Rao vs. The State]

A.I.R. 1966 S.C. 43
[Nathulal vs. State of M.P.]

1965 (1) S.C.R. 123
[State of Maharashtra vs. Mayer Hans George]

(1974) 1 S.C.C. 167
[Pyarali K. Tejani vs. Mahadeo Ramachandra Dange]

(1964) 7 S.C.C. 361
[Dahyabhali Chhaganbhai Thakker vs. State of Gujarat]

(1974) 4 S.C.C. 764
[State of U.P. vs. Ram Swarup]

(1996) 6 S.C.C. 457
[Periasami vs. State of Tamil Nadu]

A.I.R. 1964 S.C. 136
[A. Raghavamma vs. A. Chenchamma]

(2001) 4 S.C.C. 375
[Sucha Singh vs. State of Punjab]

(1994) 5 S.C.C. 410
[Sanjay Dutt vs. State through CBI, Bombay (II)]

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1982 (133) I.T.R. 909
[Uttam Chand vs. Income Tax Officer]

1991 (54) Taxman – Tax Reports 152
[Asst. Commissioner of Income Tax vs. BELCO Engineers (P) Ltd.]

1993 (68) Taxman – Tax Reports 300
[Smt. Pushpa Maini vs. Income Tax Officer]

1996 Crl. L.J. 449
[Shastri Sales Corporation vs. Income Tax Officer]

1997 (92) Taxman – Tax Reports 253
[Income Tax Officer vs. Inderjit Chopra]

1997 (224) I.T.R. 119
[Mahadeo Lal Agarwala vs. State of Bihar]

1997 (224) I.T.R. 687
[G.L. Didwania vs. Income Tax Officer]

1998 (233) I.T.R. 783
[Sureshchand Gupta vs. Union of India]

1999 (106) Taxman – Tax Reports 536
[Sheo Shankar Sah vs. Commissioner of Income Tax]

(2001) 3 S.C.C. 459
[Commissioner, Income Tax vs. Bhupen Champak Lal Dalal]

2001 (118) Taxman – Tax Reports 258
[Bhupen Champak Lal Dalal vs. Sandeep Kapoor]

2002 (123) Taxman – Tax Reports 891
[Ram Gulam Shah & Sons vs. Commissioner of Income Tax]

2002 (123) Taxman – Tax Reports 51
[Satyanarain Prasad vs. State of Bihar]

2002 (120) Taxman – Tax Reports 253
[Ravi Medical Agencies vs. Union of India]

2002 (120) Taxman – Tax Reports 805
[Ruchi Associates (P) Ltd. vs. Asst. Commissioner of Income Tax]

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2005 (142) Taxman – Tax Reports 549
[V. Gopal vs. Assistant Commissioner]

2005 (275) I.T.R. 268
[Tata Robins Fraser Ltd. vs. State of Jharkhand]

(1983) 4 S.C.C. 697
[Commissioner of Wealth Tax, Gujarat vs. Smt. Vimlaben V. Mehta]

(2004) 7 S.C.C. 15
[Monaben Ketanbhai Shah vs. State of Gujarat]

(2005) 8 S.C.C. 89
[S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla]

2006 (10) SCALE 301
[M. Nagaraj vs. Union of India]

2004 (2) S.C.C. 130
[Teri Oat Estates (P) Ltd. vs. Union Territory of Chandigarh]

A.I.R. 1961 S.C. 1808
[State of Bombay vs. Kathi Kalu Oghad]

(1999) 5 S.C.C. 241
[Prem Dass vs. Income Tax Officer]

(2001) 2 S.C.C. 386
[Om Kumar vs. Union of India]

(1981) 2 S.C.C. 335
[State of Karnataka vs. Pratap Chand]

(2005) 6 S.C.C. 499
[State of H.P. vs. Gujarat Ambuja Cements Ltd.]

1997 (94) Taxman – Tax Reports 99
[Income Tax Officer vs. K.A. Siddique]

(1997) 7 S.C.C. 622
[Mansukhlal Vithaldas Chauhan vs. State of Gujarat]

(1985) 3 S.C.C. 545
[Olga Tellis vs. Bombay Municipal Corporation]

(1994) 3 S.C.C. 569
[Kartar Singh vs. State]

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(1999) 6 S.C.C. 172
[State of Punjab vs. Balbir Singh]

I.L.R. 26 Patna 46
[Srinivas Mall vs. King Emperor]

(1991) 3 S.C.C. 655
[K. Veerasami vs. Union of India]

(1983) 4 S.C.C. 696
[C.I.T. vs. Bennett & Coleman]

(2002) 2 S.C.C. 135
[Dilawar vs. State]

(2000) 5 S.C.C. 679
[Om Parkash Sharma vs. C.B.I., Delhi]

(1984) Supp. S.C.C. 437
[P. Jayappan vs. S.K. Perumal]

A.I.R. 1986 S.C. 2045
[R.S. Nayak vs. A.R. Antulay]

(1960) 1 SCR 461
[C.S.D. Swamy vs. State]

A.I.R. 1948 Bombay 364
[Isak Solomon Macmull vs. Emperor]

A.I.R. 1990 S.C. 209
[Gurbachan Singh vs. Satpal Singh]

(1965) 3 All E.R. 593
[Patel vs. Comptroller of Customs]

The relevant decisions will be taken up for discussion hereinafter.

13. Learned counsel for the petitioners also referred to various decisions of Courts of other countries. They are listed hereunder :

1935 All E.R. 1
[Woolmington vs. Director of Prosecution]

(1970) 1 All E.R. 219
[Jayasena vs. Reginam]

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(1987) 1 All E.R. 1
[R. v. Hunt]

60 L. Ed. 2d. 777
[County Court Ulster, New York vs. Samuel Allen]

(1988) 13 E.H.R.R. 379
[Salabiaku vs. France]

(1941) 3 All E.R. 272
[Mancini vs. Director of Prosecution]

78 L.Ed. 664
[George Morrison vs. People of State of California]

(1963) A.C. 160
[Lim Chin Aik vs. The Queen]

(1985) 157 C.L.R. 527
[He Kaw Teh]

(1987) 11 N.S.W.L.R. 541
[Rex vs. Wamfler]

(1996) 3 S.C.R. 1128
[Rex vs. Hingi]

1902 Appeal Cases 317 (PC)
[Jacob Bruhn vs. The King on the Prosecution of the Opium Farmer]

(1946) 175 The Law Times Reports 306
[Brend vs. Wood]

(1942) 28 Crim. App. Rep. 160
[Rex vs. Greenberg]

[1988 (3) All E.R. 1045]
[Porter vs. Honey]

(1964) 3 All E.R. 820
[Vane vs. Yiannopoullos]

(1972) 42 CD 135
[X vs. U.K.]

(2005) 1 All E.R. 237
[Sheldrake vs. Director of Public Prosecutions]

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(1902) 2 K.B. 1
[Pearks, Gunston & Tee Ltd. vs. Ward]

73 L.Ed. 575
[W.D. Manley vs. State of Georgia]

[1979) 1 W.L.R. 94
[Charles Ferguson vs. The Queen]

60 L.Ed. 899
[McFarland vs. American Sugar Ref. Co.]

55 L.Ed. 191
[Bailey vs. Alabama]

44 L.Ed. 2D 508
[Mullaney vs. Stilman]

14. In 1956 S.C.R. 199 [Shambhu Nath Mehra vs. State of Ajmer], the Supreme Court held that Section 106 does not abrogate the well established statute of criminal law that except in very exceptional classes of cases, the burden which lies on the prosecution to prove its case never shifts and that Section 106 is not intended to relieve the prosecution of that burden. The learned Judges observed that on the contrary, Section 106 is intended to meet certain exceptional cases where it is impossible and disproportionately difficult for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. The Section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts. The following extract is relevant :

> *"..... The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."*

It was observed that this Section must be considered in a common sense way, and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration.

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15. In 1965 (3) S.C.R. 235 [Harbhajan Singh vs. State of Punjab], the Supreme Court, quoting Viscount Sankey in [1935] A.C. 452 [Woolmington vs. Director of Public Prosecutions], emphasised the following fundamental doctrine of criminal law that the onus to prove its case lies on the prosecution :

> *"No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

It will be seen that Woolmington's case and the principle laid therein is constantly referred to and reiterated again and again, wherever the question of burden of proof arises.

16. In 1966 (3) S.C.C. 736 [V.D. Jhingan vs. State of Uttar Pradesh], which arose out of the Prevention of Corruption Act, 1947, it was contended that, *"... mere receipt of money did not justify the raising of the presumption and that something more than the mere receipt of the money had to be proved."* This argument was rejected and it was held that the mere receipt of the money was sufficient to raise a presumption. In this case, the Supreme Court again, on a construction of that particular provision, held that it was sufficient if the accused person proves the preponderance of probability for discharging the burden. Woolmington's case is again quoted by the Supreme Court.

17. In (1972) 3 S.C.C. 22 [Dr. S.L. Goswami vs. State of Madhya Pradesh], the Supreme Court held that it is no part of the prosecution's duty to somehow hook the crook and that even in cases where the defence of the accused does not appear to be credible or is palpably false, the burden on the prosecution does not become any less and where the onus shifts to the accused, he will be entitled to the benefit of reasonable doubt if he probabilises his plea. In (1973) 2 S.C.C. 808 [Kaliram vs. State of Himachal Pradesh], the Supreme Court held that if some material is brought on record, consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to the benefit of acquittal. The Supreme Court here construes the word "doubt" in the context of reasonable doubt regarding the guilt of the accused and as regards the rule of benefit of doubt, the Supreme Court holds that the doubt regarding the guilt of the accused should be a reasonable one and not the doubt of a vacillating mind or a mind that it is incapable of reaching a firm conclusion or so timid that is is hesitant and afraid to take things to their natural consequences. Similarly, the rule regarding the benefit of doubt does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations.

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18. In (1981) 3 S.C.C. 199 [State of Maharashtra vs. Wasudeo Ramchandra Kadalwar], the Supreme Court dealt with the question of burden of proof under Section 5(1)(e) and 5(2) of Prevention of Corruption Act, 1947. The Supreme Court construed the difficult question as to the nature and extent of burden of proof under Section 5(1)(e) of the Act. According to their lordships, the expression 'burden of proof' has two distinct meanings – (1) the legal burden, i.e., The burden of establishing the guilt, and (2) the evidential burden, i.e., the burden of leading evidence. The legal burden, i.e., the duty to prove the guilt never shifts from the prosecution, but the burden of proving a particular fact may be laid by the law on the accused. It was submitted that by virtue of the impugned Section, prosecution was not required to prove anything.

19. The requirement of *mens rea* or the mental element in every crime is indisputable, since without a blameworthy mind, there can be no offence. But *mens rea* can be either clearly or by necessary implication ruled out as a constituent part of a crime and this has been reiterated in many decisions. The following proposition of law as laid down in J.C. Smith & Brian Hogan's Criminal Law, 6th Edition, pg. 31 was referred to by the Supreme Court in (2003) 9 S.C.C. 700 [R. Balakrishna Pillai vs. State of Kerala] :

> *"It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a) that he caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbiden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. The event, or state of affairs, is called the actus reus and the state of mind the mens rea of the crime."*

1951 S.C.R. 322 [Ravula Hariprasada Rao vs. The State], Isak Solomon Macmull vs. Emperor [A.I.R. 1948 Bombay 364] and A.I.R. 1966 S.C. 43 [Nathulal vs. State of M.P.] also deal with the requirement of *mens rea.*

20. In Lim Chin Aik vs. The Queen [(1963) A.C. 160], the Privy Council reviewed the entire law on the question in an illuminating judgment and approached the question, and the following extract is relevant :

> *"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do,*

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directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

The learned counsel submitted that the illegal provision cannot be justified by the prosecution by merely stating that it is necessary to check economic offences, and then go about trigger happy.

21. Reliance was placed on (1999) 6 S.C.C. 172 [State of Punjab vs. Baldev Singh] and it was submitted that the prosecution cannot abdicate its responsibility to prove the guilt beyond reasonable doubt. Learned counsel referred to the following observations of the Supreme Court in the above case :

"Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice."

22. In (2001) 4 S.C.C. 375 [Sucha Singh vs. State of Punjab], the Supreme Court held that the presumption under Section 106 of the Indian Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts, from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.

23. (2001) 2 S.C.C. 386 [Om Kumar vs. Union of India] was cited to show that proportionality has been applied to legislative action even from the year 1950. The Supreme Court in that case held as follows :

"By 'proportionality' we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights,

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liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the adminis-trative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality."

"Patanjali Sastri, C.J. in *State of Madras* v. *V.G. Row [A.I.R. 1952 S.C. 196]*, observed that the Court must keep in mind the 'nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the *disproportion* of the imposition, the prevailing conditions at the time'. This principle of proportionality vis-à-vis legislation was referred to by Jeevan Reddy, J. in *State of A.P.* v. *McDowell & Co.* [(1996) 3 S.C.C. 709] recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands."

24. As regards proportionality, learned counsel for the petitioners also cited 2004 (2) S.C.C. 130 [Teri Oat Estates (P) Ltd. vs. Union Territory of Chandigarh], wherein it has been held as follows :

"By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be."

25. Learned Counsel for the petitioners also referred to (2005) 1 All E.R. 237 [Sheldrake vs. Director of Public Prosecutions], which dealt with the statutory imposition of burden of proof and the opinion of Lord Bingham of Cornhill was extensively cited, where there is reference to what is called 'reverse burden', reverse because the burden is placed on the defendant and not, as ordinarly done in criminal prosecution, on the prosecutor. The following extracts from the above case are relevant :

"One of the articles of the French Customs Code mentioned in Hoang vs. France [(1993) 16 E.H.R.R. 53] was Article 373, which provided -

'In any proceedings concerning a seizure of goods, the burden of proving that no offence has been committed shall be on the person whose goods have been seized.'

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In argument before the Commission, the government dismissed this article as irrelevant, since the applicant's goods had not been seized, and the European Court did no more than mention it. If, however, it had been relevant and had been interpreted and applied entirely literally by the French courts, its compatibility with Article 6(2) would surely have been questionable."

"An emergency anti-terrorist enactment was held in Heaney vs. Ireland [(2001) 33 E.H.R.R. 264] to violate the Article 6 (1) right of the applicants to remain silent and not incriminate themselves, and also to violate the presumption of innocence guaranteed by Article 6(2) because of the close link, in this context, between it and the rights guaranteed by Article 6(1). The European Court rejected the Irish government's contention that the enactment in question was justified by its security and public order concerns since the enactment extinguished the very essence of the applicants' rights to silence and against self-incrimination."

"In order to maintain the balance between the individual and the society as a whole, rigid and flexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty."

26. Repelling the arguments advanced on the side of the petitioners, learned Additional Solicitor General of India Mr. Gopal Subramaniam submitted that both the grounds of attack on the constitutionality of the offending Section are without merit. It was submitted that while conceding that there was a shift with regard to the burden of proof, it should be seen that the offences under the Income Tax Act are quite different from the offences under the Penal Code or like legislations. The Income Tax Act imposes on the petitioners a mandatory obligation to discharge certain duties or to respond to notices etc., and failure to comply with these duties constitute the offence. The legislature felt that considering the mandatory nature of the obligation, any failure in this regard could be presumed to be wilful unless proved to the contrary. The statutory presumption forms part of the law of evidence. In matters like these, the legislature may some times dispense with the requirement of proof totally, and the very act *per se* would constitute the offence. Whereas, in the present case, the rigour is slightly alleviated by the fact that the assessee has the right to show the non-existence of the culpable mental state. The learned Additional Solicitor General further

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submitted that it cannot be said that there is no nexus between what is asked to be presumed and the person in respect of whom this presumption is made. It was further submitted that it is afterall the assessee, who has the duty to file the returns or to answer to the notices and whether the lapse was deliberate was something that the assessee alone could prove. It is also submitted that where the person is a firm, the obligation to file returns exists regardless of whether there was taxable income or not and that this is clear from a reading of the Section. Learned Additional Solicitor General referred to the historical background against which this amendment was introduced.

27. In support of his submissions, learned Additional Solicitor General relied on the following decisions :

(2004) 9 S.C.C. 686
[Prakash Nath Khanna v. C.I.T.]

(1979) 2 S.C.C. 179
[Ratilal Bhanji Mithani vs. State of Maharashtra]

(1980) Supp. S.C.C. 92
[V.C. Shukla vs. State through CBI]

(1989) 1 S.C.C. 715
[Stree Atyachari Virodhi Parishad vs. Dilip Nathuman Chordia]

(1993) 2 S.C.C. 567
[State of Maharashtra vs. Dr. Budhikot Subbarao]

(1996) 4 S.C.C. 659
[State of Maharashtra vs. Som Nath Thapa]

(1997) 4 S.C.C. 393
[State of Maharashtra vs. Priya Sharan Maharaj]

(1998) 5 S.C.C. 749
[Pepsi Foods Ltd. vs. Special Judicial Magistrate]

(2000) 1 S.C.C. 138
[Umar Abdul Aakoor Sorathi vs. Intelligence Officer, Narcotic]

(2000) 1 S.C.C. 722
[Kanti Bhadra Shah vs. State of West Bengal]

(2000) 2 S.C.C. 57
[State of Madhya Pradesh vs. S.B. Johari]

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(2000) 5 S.C.C. 440
[State of Tamil Nadu vs. J. Jayalalitha]

(2000) 8 S.C.C. 239
[State of Delhi vs. Gyan Devi]

(2002) 1 S.C.C. 465
[State of Bihar vs. Baidnath Prasad]

(2005) 1 S.C.C. 568
[State of Orissa vs. Debendra Nath Padhi]

(1986) 2 S.C.C. 587
[State of U.P. vs. Man Mohan]

(1986) 1 S.C.C. 445
[Maya Rani Punj vs. C.I.T.]

A.I.R. 1971 S.C. 834
[Mahant Abhey Dass vs. S. Gurdial Singh]

(1979) 4 S.C.C. 172
[Mohd. Iqbal Ahmad vs. State of Andhra Pradesh]

(1997) 7 S.C.C. 622
[Mansukhlal Vithaldas Chauhan vs. State of Gujarat]

(2006) 4 S.C.C. 278
[Standard Chartered Bank vs. Directorate of Enforcement]

(2004) 2 S.C.C. 731
[K.C. Builders vs. C.I.T.]

A.I.R. 1970 S.C. 962
[Asst. Customs Collector vs. L.R. Melwani]

A.I.R. 1958 S.C. 61
[State of Madras vs. A. Vaidyanatha Iyer]

A.I.R. 1962 S.C. 1052
[Izhar Ahmad vs. Union of India]

(1986) 2 S.C.C. 486
[Sodhi Transport Co. v. State of U.P.]

(2004) 9 S.C.C. 319
[State of A.P. vs. V. Vasudeva Rao]

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A.I.R. 1964 S.C. 575
[Dhanvantrai vs. State of Maharashtra]

(2003) 12 S.C.C. 395
[Ramakant Rai vs. Madan Rai]

A.I.R. 1980 S.C. 593
[State of Maharashtra vs. Natwarlal Damodardas Soni]

A.I.R. 1964 S.C. 464
[Sajjan Singh vs. State of Punjab]

(2001) 10 S.C.C. 340
[Limbaji vs. State of Maharashtra]

1994 Supp. (2) S.C.C. 143
[Bhanabhai Khalpabhai vs.Collector of Customs]

(2004) 3 S.C.C. 753
[T. Shankar Prasad vs. State of A.P.]

(1991) 3 S.C.C. 655
[K. Veeraswami vs. Union of India]

(2001) 6 S.C.C. 16
[Hiten P. Dalal vs. Bratindranath Banerjee]

(2001) 1 S.C.C. 691
[M. Narsinga Rao vs. State of A.P.]

(1977) 1 S.C.C. 133
[Narayan Govind Gavate vs. State of Maharashtra]

A.I.R. 1957 S.C. 877
[Babulal vs. Collector of Customs]

A.I.R. 1962 S.C. 316
*[Collector of Customs vs.
Nathella Sampathu Chetty]*

A.I.R. 1986 S.C. 2045
[R.S. Nayak vs. A.R. Antulay]

1996 (6) S.C.C. 255
[Devchand Kalyan Tandel vs. State of Gujarat]

(1996) 10 S.C.C. 104
[Dalmia Cement (Bharat) Ltd. vs. Union of India]

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1999 Crl. L.J. 1252
[R. Muthukrishnan vs. Agricultural Officer]

(1986) 2 S.C.C. 587
[State of U.P. vs. Manmohan]

(1977) 4 S.C.C. 39
[State of Bihar vs. Ramesh Singh]

(2000) 6 S.C.C. 338
[State of M.P. vs. Mohanlal Soni]

1992 (194) I.T.R. 690
[Dr. M.S. Dhowani vs. J. Ranganathan]

(2000) 1 S.C.C. 722
[Kanti Bhadra Shah vs. State of West Bengal]

2005 A.I.R. S.C.W. 1684
[C.S. Krishnamurthy vs. State of Karnataka]

(1991) 3 S.C.C. 442
[Tribhovandas Haribhai Tamboli vs. Gujarat]

1989 (179) I.T.R. 558
[Geethanjali Mills Ltd. vs. V. Thiruvengadathan]

1998 (234) I.T.R. 261
[Laxmandas Pranchand vs. Union of India]

1997 (223) I.T.R. 68
[Income Tax Officer vs. Dinesh K. Shah]

1992 (194) I.T.R. 690
[Dr. M.S. Dhowani vs. J. Ranganathan]

2000 (242) I.T.R. 39
[Sonarame Chemicals Pvt. Ltd. vs. Union of India]

(1977) 4 S.C.C. 39
[State of Bihar vs. Ramesh Singh]

(2000) 6 S.C.C. 338
[State of M.P. vs. Mohanlal Soni]

(2003) 11 S.C.C. 405
[Asst. Commissioner vs. Velliappa Textiles Ltd.]

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2005 A.I.R. S.C.W. 1684
[C.S. Krishnamurthy vs. State of Karnataka]

(1977) 1 S.C.C. 133
[Narayan Govind Gavate vs. State of Maharashtra]

1999 Crl. L.J. 4190
[Pentapati Venkata Satyanarayana Murthy vs. State of A.P.]

1996 (6) S.C.C. 255
[Devchand Kalyan Tandel vs. State of Gujarat]

1999 Crl. L.J. 1252
[R. Muthukrishnan vs. Agricultural Officer]

28. In (2006) 4 S.C.C. 278 [Standard Chartered Bank vs. Directorate of Enforcement], in which the constitutionality of the provisions of the Foreign Exchange Regulation Act (FERA) was challenged, the Supreme Court held that in view of the fact that FERA has been included in the IX Schedule, the challenge based on Articles 14 and 21 cannot prevail, but however, on the scheme of the Act, found that the provisions cannot be successfully challenged as being either arbitrary or discriminatory. The Supreme Court bore in mind the object of the Act, which was to protect the economic interest of the country. According to the respondents, this approach would apply here too.

29. In A.I.R. 1958 S.C. 61 [State of Madras vs. A. Vaidyanatha Iyer], the Supreme Court set aside the acquittal order passed by the High Court on the ground that where there is a presumption of law, it is obligatory on the court to raise this presumption, which in that case was the presumption under Section 4 of the Prevention of Corruption Act, because unlike a case of presumption of fact, presumption of law constitutes a branch of jurisprudence and this special rule of burden of proof cannot be disregarded. The Supreme Court held that the approach of the High Court in that case had been on erroneous lines since the special rule of the burden of proof had been disregarded.

30. A.I.R. 1962 S.C. 1052 [Izhar Ahmad vs. Union of India] arose under the Citizenship Act. In this judgment, there is reference to various texts with regard to presumption. The Supreme Court in this case observed as follows :

> *"It is conceded, and we think rightly that a rule prescribing rebuttable presumption is a rule of evidence. It is necessary to analyse what the rule about the rebuttable presumption really means. A fact which 'A' has relevance in the proof of fact 'B' and inherently has some degree of*

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probative or persuasive value in that behalf may be weighed by a judicial mind after it is proved and before a conclusion is reached as to whether fact 'B' is proved or not. When the law of evidence makes a rule providing for a rebuttable presumption that on proof of fact 'A', fact 'B' shall be deemed to be proved unless the contrary is established, what the rule purports to do is to regulate the judicial process or appreciating evidence and to provide that the said appreciation will draw the inference from the proof of fact 'A' that fact 'B' has also been proved unless the contrary is established. In other words, the rule takes away judicial discretion either to attach the due probative value to fact 'A' or not and requires prima facie the due probative value to be attached in the matter of the inference as to the existence of fact 'B', subject of course, to the said presumption being rebutted by proof to the contrary."

31. In (1986) 2 SCC 486 [Sodhi Transport Co. v. State of U.P.], there was a challenge to Section 28B of the Uttar Pradesh Sales Tax Act, 1948 and Rule 87 of the Rules made under the Act. In the State of Uttar Pradesh, it was found that there was large scale evasion of sales tax and hence the legislature enacted certain measures to prevent as far as possible such evasion in the year 1956 and thereafter, in the year 1972. But even those measures were found to be inadequate. Subsequently, in the year 1973, Section 28B was enacted, which provided that failure to deliver the transit pass obtained in the prescribed manner to the officer in charge of the last checkpost or barrier will give rise to the presumption that the goods carried thereby have been sold within the State. It was held as follows :

"In our opinion a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence."

32. An important decision that was cited was A.I.R. 1962 S.C. 316 [Collector of Customs vs. Nathella Sampathu Chetty], in which it was contended that the rule of evidence casts the burden of proof upon a person from whom specific goods have been seized, to establish that they are not smuggled. Various decisions of other courts were also cited in this case. The following observations are relevant :

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"These facts which justified the seizing officer to reasonably believe that the goods were smuggled would certainly impart a rational connection between the facts on which the presumption is raised and the fact to be proved, so that whatever other constitutional infirmity might attach to the impugned provision, the lack of rational connection is not one of them. It appears to us therefore that the argument regarding the lack of rational connection has no substance. It is derived wholly on a literal reading of Section 178-A and would not be available if the provisions were read in the manner we have just now indicated."

"The only prerequisite for the application of the section is the subjectivity of the Customs Officer in having a reasonable belief that the goods are smuggled."

"But still the adjudicating officer would have to satisfy himself that the requirements of Section 178-A had been complied with before invoking the presumption laid down by that section.

"The deleterious effects of smuggling, as pointed out in the extract from the Report, are real and it is not in dispute that the prevention and eradication of smuggling is a proper and legally attainable objective and that this is sought to be achieved by the relevant law. If therefore for the purpose of achieving the desired objective and to ensure that the intentions of Parliament shall not be defeated a law is enacted which operates somewhat harshly on a small section of the public, taken in conjunction with the position that without a law in that form and with that amplitude smuggling might not be possible of being effectively checked, the question arises whether the law could be held to be violative of the freedom guaranteed by Article 19(1)(f) and (g) as imposing an unreasonable restraint."

It is true that in the above case, the challenge was on the anvil of Article 19(1)(f) and (g), but yet, it is relevant to the extent that the intention of the Parliament appears to be to achieve the object of checking evasion of tax properly by raising the presumption of culpable mental state, since the previous position was insufficient to check the evil that is sought to be eradicated.

33. The respondents contend that the application of the doctrine of proportionality vis-a-vis an administrative action is different from its application in the context of determining the *vires* of a statute. While determining the validity of a statute, Courts may only ask the question

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whether there is legislative competence and whether there is any violation of human rights and in the context of violation of Article 14, Courts must look into the reasonableness, as to whether the classification is reasonable and whether there is sufficient nexus to the object that is sought to be achieved. It was open to the Parliament to make the non-filing of a return *ipso facto* an offence without making *mens rea* a requirement. But, the Parliament chose to adopt a different standard, a less strict one, stipulating willfulness as a requirement, but raising a presumption and requiring the accused to discharge the burden. In this context, the respondents referred to 1996 (6) S.C.C. 255 [Devchand Kalyan Tandel vs. State of Gujarat] and 1999 Crl. L.J. 1252 [R. Muthukrishnan vs. Agricultural Officer], which is a decision of this Court, wherein it has been held as follows :

> *"Section 10C(2) made it clear that the Parliament made a significant departure from the usual approach by introduction of Section 10C of the Act in order to make the burden on the accused rigorous. In other words, the concept of mens rea in the commission of the offence under this Act is safeguarded again. The idea is to plug up possible loopholes through which economic offenders used to escape from the clutches of law."*

Hence, it was contended that the impugned provision did not offend the principle of proportionality. It was submitted that, therefore, there was no merit in the challenge to the constitutionality of the impugned provision.

34. The relevant provisions of the Income Tax Act, 1961 are extracted hereunder :-

Section 139 of the Income Tax Act reads thus :

> "Return of income.—
>
> 139.(1) Every person, -
>
> (a) being a company or a firm; or
>
> (b) being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax,
>
> shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.

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Section 142 of the Income Tax Act reads thus :

"Inquiry before assessment.

142.(1) For the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return under section 139 or in whose case the time allowed under sub-section (1) of that section for furnishing the return has expired a notice requiring him, on a date to be therein specified,-

(i) where such person has not made a return within the time allowed under sub-section (1) of section 139, to furnish a return of his income or the income of any other person in respect of which he is assessable under this Act, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.

Section 148 of the Income Tax Act reads thus :

"Issue of notice where income has escaped assessment.—

148.(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

Section 276CC of the Income Tax Act reads thus :

"Failure to furnish returns of income.

276CC. If a person wilfully fails to furnish in due time the return of fringe benefits which he is required to furnish under sub-section (1) of section 115WD or by notice given under sub-section (2) of the said section or section 115WH or the return of total income which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (i) of sub-section (1) of section 142 or section 148 or section 153A, he shall be punishable, –

(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one

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hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of fringe benefits under sub-section (1) of section 115WD or return of income under sub-section (1) of section 139 –

(i) for any assessment year commencing prior to the 1st day of April, 1975; or

(ii) for any assessment year commencing on or after the 1st day of April, 1975, if –

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees."

Section 278E of the Income Tax Act reads thus :

"Presumption as to culpable mental state.

278E. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation – In this sub-section, 'culpable mental state' includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

35. From a reading of the above provisions, it is evident that the following factors will have to be established by the prosecution :

? that the accused person has failed to furnish the return under Section 139(1) or by notices under Section 142 or Section 148 or Section 153 of the Act;

? that the accused person has not done it in due time.

Once these two factors are established, it is for the accused person to prove beyond reasonable doubt that the failure was not wilful.

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36. We will next look at the position that prevailed before the Act was amended. Section 29 of the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 introduced several changes in Sections 271A, 271B, 272A, 272AA, 272B, 273, 273B, 276A, 276AB, 276B, 276DD and 276E of the 1971 Act. As per the objects of the Act, the amendments were intended to mainly implement certain proposals included in the long term fiscal policy. As per the existing provisions, penalty was leviable under Section 270 of the Income Tax Act for failure to furnish information regarding securities, under Section 271A for delay in filing return of income without reasonable cause, under Section 271B for non-compliance of notice issued under Section 143(2) or 142A(1) or 142A (2), under Section 271A for failure to maintain books of account, under Section 271B for failure to get the accounts audited, under Section 272A for failure to answer queries, under Section 272AA for failure to comply with the provisions of Section 133B, under Section 272B for non-compliance of the provisions of Section 139A, under Section 273(1)(b) for failure to furnish a statement of advance tax, under Section 273(2)(b) for failure to furnish estimate of advance tax and under Section 273(2) (c) of the Act for failure to furnish earlier estimate of advance tax. Originally, penalty was leviable under these provisions if the above defaults were committed without reasonable cause or excuse, as the case may be. But, by the amendment, the words "without reasonable cause" or "without reasonable excuse" were deleted and thereby, the default itself would render the assessee liable to penalty. Section 273B was inserted, which provided that no penalty was imposable on the person of the assessee for the defaults referred to in the above provisions, if he proves that there was reasonable cause or excuse for the said failure. Therefore, the amendent casts the onus of proving the existence of reasonable cause or excuse for the defaults referred to on the tax payer. So, by the amendments, certain acts or omissions made the assessee strictly liable without further ado. But, in the sections where the '*mens rea*' criterion was not deleted, the onus of proof was shifted. For this purpose, Section 278E was included, which is the provision that is challenged in these writ petitions, which requires the Court to presume the existence of a culpable mental state on the part of the accused in any prosecution for any offence under the Act which requires such mental state.

37. In paragraph 12.2 of the Explanatory Notes on the Taxation Laws (Amendment) Act, 1986, it is stated that in order to effectively tackle the problem of tax evasion, the Income Tax Department will implement a strategy consisting *inter alia* of removing weaknesses in the law which hinder effective prosecution of tax evaders and that it was intended to incorporate certain provisions in the direct tax laws, similar to those which already existed in the Customs Act and the Gold (Control) Act. The intention of the Government was announced by the long term fiscal policy to amend the direct tax laws providing similar provisions so that once evasion is proved, the intention to evade need not be proved. Section 278E, which has been extracted above, was based on the provisions

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contained in similar enactments dealing with economic offences. The Statement of Objects and Reasons with reference to Section 278E to the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 reads thus :

> *"To remove weaknesses in the provisions in the direct tax laws in respect of penalties and prosecution so as to shift the burden of proof on the assessee and to provide that once the evasion of tax is proved, the intention to evade need not be proved by the income tax department."*

38. When we see the background within which the legislature decided to enact Section 278E of the Income Tax Act, the attack on its constitutionality loses strength, for as observed in the Sodhi Transport Co.'s case (supra), when the person concerned has the opportunity to rebut the presumption, it is hard to see how the provision is unconstitutional. When the legislature has the power to make a law with respect to any subject, it equally has all the ancillary and incidental powers to make the law effective. In the words of Lord Dunedin in *Whitney v. I.R.C. [(1925) 10 T.C. S.S. 110],*

> *"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."*

Once a liability is fixed, it is highly improbable that the statute should not go on to make that liability effective.

39. The judgment in (2004) 9 S.C.C. 686 [Prakash Nath Khanna v. C.I.T.] answers a lot of questions raised by the petitioners herein, though in that case, the constitutionality of the provisions was not challenged. It was observed therein that while interpreting a provision, the Court can only interpret the law and cannot legislate it, and if a provision of law is misused and subjected to abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. The words "in due time" occurring in Section 276CC of the Income Tax Act were interpreted in this decision and it was held that even if a return is filed in terms of sub-section (4) of Section 139, that will not dilute the infraction in not furnishing the return in due time. The following words are relevant :

> *"..... There is no condonation of the said infraction, even if a return is filed in terms of sub-section (4)."*

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In the above case, the contention that Section 276CC is applicable only when there is discovery of the failure regarding evasion of tax was also rejected, as also the contention that the return under Section 139(4) was filed before the discovery of failure regarding evasion, stating that the provision has no application. It was held by the Supreme Court as follows :

> *"The provision consists of two parts. First relates to the infractions warranting penal consequences and the second, measure of punishment. The second part in turn envisages two situations. The first situation is where there is discovery of the failure involving the evasion of tax of a particular amount. For the said infraction stringent penal consequences have been provided. Second situation covers all cases except the first situation elaborated above."*
>
> The question whether there is a wilful failure was also held to be a matter upon which there should be a factual adjudication by the Court and while the Court has to presume the existence of culpable mental state as per Section 278E, it was certainly *"open to the appellants to plead the absence of culpable mental state when the matter is taken up for trial".*

40. The fact that the rule of *mens rea* is a *sine qua non* for an offence is not disputed. Therefore, it is unnecessary to refer to any of the judgments which lay down that proposition. There is also no disputing the rule that it is for the prosecution to prove the guilt of the accused. This is the normal rule in criminal jurisprudence. However, there may be situations where the law provides, as in the case of statutory offences, that *mens rea* shall be presumed, which presumption will be rebuttable. The legislature may also provide that a particular act by itself without anything more will constitute the offence and attract the penalty, a penalty which may be quantified in terms of money or which may be a physical penalty, viz. Imprisonment. In this context, we may refer to the following observations in Sheldrake's case (supra) :

> *"But it is of course the ordinary duty of the courts to give effect to what Parliament has by clear words or necessary implication enacted, and it is not hard to find instances in which Parliament has clearly intended to attach criminal consequences to proof of defined facts, irrespective of an individual's state of mind or moral blameworthiness. Many such instances are found in legislation regulating the conduct of economic and social life."*

41. The argument that *mens* rea, which is an element of the offence, has been well nigh dispensed with, thus rendering the word 'wilfully' in Section 276CC of the Act, is answered thus, and I quote Jacob Bruhn vs. The King on the Prosecution of the Opium Farmer [1902 Appeal Cases 317

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(PC)] :

> *"..... By this Ordinance, every person other than the opium farmer is prohibited from importing or exporting chandu. If any other person does so, he prima facie commits a crime under the provisions of the Ordinance. If it be provided in the Ordinance, as it is, that certain facts, if established, justify or excuse what is prima facie a crime, then the burden of proving those facts obviously rests on the party accused. In truth, this objection is but the objection in another form, that Knowledge is a necessary element in crime, and it is answered by the same reasoning."*

Therefore, culpable mental state is a necessary element in this offence under Section 276CC too and without it, there is no offence; the only difference is, the accused should prove the existence of circumstances which negate *mens rea*.

42. In Brend vs. Wood [(1946) 175 The Law Times Reports 306], Rex vs. Greenberg [(1942) 28 Crim. App. Rep. 160] is explained :

> *"In other words, they approved Asquith, J.'s ruling that, if the Crown can show that the coupons, or whatever the document may be, have been acquired in a manner not permitted by law, that is enough; but enough in the sense only, in my opinion, that it is enough to establish a prima facie case that the defendant had intent to deceive ..... which the respondent must answer, if he can. If, as is the case, he has satisfied the magistrate of his good faith in the matter, he negatives the intent to deceive."*

Humphreys, J., referring again to the same judgment, said :

> *"When he said that the intent to deceive could be shown by giving evidence that the documents were irregular, what he meant was that that afforded a prima facie case which was sufficient, unless answered, to justify the tribunal of fact in convicting."*

In Porter vs. Honey [1988 (3) All E.R. 1045], the House of Lords held as follows :

> *"It is true that the burden of proving this defence is placed on the defendant but it should not be difficult to discharge in a genuine case."*

This applies to the petitioners herein.

43. In X vs. U.K. [(1972) 42 CD 135], a provision under the Sexual Offences Act, which gives rise to a rebuttable presumption, was attacked as being violative of Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The

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Commission rejected the attack holding that, what was created was a rebuttable presumption which the defendant should disprove and it was not a presumption of guilt and that in the present instance, the presumption was restrictedly worded and was neither irrebuttable nor unreasonable. The following sentence is very relevant - *"To oblige the prosecution to obtain direct evidence of living on immoral earnings would, in most cases, make its task impossible"*. The following extract from the above judgment is relevant :

> *"From this body of authority, certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."*

So, it depends on the necessity for the particular legislation, the difficulty which the prosecution faces in proving what the accused has to prove, the opportunity given to the accused to rebut the presumption. The same may be applied here. In this background, the presumption in Section 278E appears to be fair and reasonable. In the present case, to require the prosecution to obtain direct evidence on why the petitioners did not file their returns in time would make the task impossible and make Section 276CC of the Act illusory. But once the accused produces that evidence, the prosecution will fail unless it demolishes the evidence so produced. The Court still has to decide the issue on the basis of the evidence, that power is still with the Court.

44. In Salabiaku vs. France [(1988) 13 EHRR 379], it is observed that there must be a compelling reason why it is fair and reasonable to deny the accused person the presumption of innocence. In the same breath, the judgment also holds that it is the Parliament and not the Court which is

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charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence. There, the conclusion is that there were compelling reasons why the legal burden should be placed on the defendant as there were urgent international pressures to restrain fraudulent trading in counterfeit goods, the framing of offences as offences of 'near absolute liability' and the dependence of the defence on facts within the defendant's own knowledge and that it is to be expected that those who supply traders with counterfeit products are unlikely to be co-operative, so in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place.

45. In He Kaw Teh [(1985) 157 C.L.R. 527], the issue of *mens rea* in statutory offences was examined in some detail. The Court stated that there are three matters to be considered while deciding whether presumption has been displaced and Parliament intended the offence created by legislation to have no mental ingredient. These are : *(i)* the words of the statute creating the offence; *(ii)* the subject matter of the statute; and *(iii)* whether imposing absolute liability will assist in enforcing the statute? In Rex vs. Wamfler [(1987) 11 N.S.W.L.R. 541], the statutory offences were divided into three categories for the purpose of determining whether *mens rea* is required to establish liability : (i) those in which there is an original obligation on the prosecutions to prove *mens rea*; (ii) those in which *mens rea* will be presumed to be present unless and until material is advanced by the defence as to the existence of honest and reasonable belief that the conduct in question is not criminal, in which case the prosecution must undertake the burden of negativing of such belief of reasonable doubt; and (iii) those in which *mens rea* plays no part and guilt is established by proof of the objective ingredients of the offence. This case dealt with a suppression order and the Court observed, *"In recent times, the move has been away from the designation of statutory offences as creating an absolute liability..... On the other hand, the onus should not fall on the prosecution to prove as part of its case that the defendant was aware of the prohibition..... A person publishing a material, the subject of a suppression order, will prima facie be guilty of an offence; if however, he or she can adduce evidence showing the existence of a honest and reasonable belief that the activity was not criminal, then the burden will fall on the prosecution to negate this"*.

46. In Rex vs. Hingi [(1996) 3 S.C.R. 1128], the appellant was charged with breach of Section 121-C of the Criminal Code which makes it an offence for an official or employee of the Government to accept from a person who has dealings with the Government, a benefit of any kind, directly or indirectly by means or through a member of his family unless he has the consent in writing of the head of the branch of Government that employs him. In that case, the appeal was allowed on the ground

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that there was persistent interference of the trial Judge which led to the conclusion that the appellant did not receive a fair trial. However, some of the observations are relevant. The following observations of the Supreme Court of Canada are useful to be borne in mind :

> *"The essence of criminal law is its public nature. A crime is in fact, ... a wrong against the community as a whole. Given this public nature, it is fitting that Parliament has consistently played the major role in defining exactly what type of conduct can be considered criminal in nature. A crime is an act which the law with appropriate penal sanctions forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public, against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had a duty to suppress the evil or to safeguard the interest thereunder." [In Re. Validity of Section 5-A of the Dairy Industry Act, 1949 S.C.R.I.]."*

It was held that the Parliament, therefore, retains the power to designate the specific acts which it considers harmful to the State. A Privy Council case was referred to, where it is stated that if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in public interest, their lordships saw no reason why Parliament should not make them crimes. It is accepted that the (statute) is to be interpreted in the widest sense, *"but that breadth of scope contemplates neither a static catalogue of offences nor of sanctions. Evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously argued"*. Most scholars and jurists agree that leaving aside offences where the *actus reus* is negligence or inadvertance and offences of absolute liability, the test for *mens rea* is subjective. *"In applying the subjective test, the Court looks to the accused's intention and the facts as the accused believe them to be*". G. Williams in the Textbook of Criminal Law, II Edition, 1983 writes : *"The Crown need not in every case show precisely what though was in the accused's mind at the time of the criminal act. In certain cases, subjective awareness of the consequences can be inferred from the act itself barring some explaining casting doubt on such inference. The fact that such an inference is made does not preclude the subjectivity of the test".*

47. In 1995 Supp. (2) S.C.C. 187 [P.N. Krishna Lal vs. Government of Kerala], what was challenged was the validity of Sections 57-A and 57-B of the [Kerala] Abkari Act (1 of 1077), as amended by Act 21 of 1984. As in the present case, there too, the validity of the Act was challenged on

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the anvil of Articles 20(3), 14 and 21 of the Constitution. The Supreme Court observed that it is necessary to keep in forefront, the need for the amendment, the ingredients of the offence and the scope of their operation. Because of consumption of adulterated arrack or toddy with methanol, there was large scale loss of valuable lives and permanent incapacity in many States. It was found that Section 57 of the Act as it originally stood was not enough, and the amendments were enacted to meet the menace. The burden of the want of knowledge was cast on the accused. It was attacked on the ground that casting the burden of proof on the accused not only violates the fundamental human rights as enshrined in the international covenants, but also the fundamental rights guaranteed by the Constitution under Articles 20(3) and 14; and casting the entire burden on the accused to prove his innocence infringes upon his right to live, thereby violating the guarantee under Article 21; and the fact that mere possession of the arrack without proof by the prosecution that it was mixed with noxious substance was sufficient to raise the presumption was violative of Articles 14 and 21; and when the intention to commit the crime was the *sine qua non* for prosecution, conviction without proof of intention was contrary to the settled principles of criminal jurisprudence. It was also contended that there should always be proof of culpable mental state of mind on the part of the accused; and any provision which imposes penalty by resorting to statutory presumption was *per se* unconstitutional. After giving their anxious and deep consideration to all the aspects, the Supreme Court rejected the contentions stating that, *"They are unacceptable and if given credence, they would frustrate the very object of the amended Act"* . The Supreme Court held that the liberty of the individual must be controlled in the interest of society and it cannot stand alone, but must be compared with the companion virtue - liberty and morality, liberty and law, liberty and justice, liberty and common good, liberty and responsibility - which are concomitants for orderly progress and social stability and that the concept of individual liberty in harmony with social order is in consonance with the universal declaration of human rights and other International Covenants. The Supreme Court held that it was no doubt true that the golden rule that runs through the web of all civilized criminal jurisprudence that the accused is presumed to be innocent unless he is found guilty of the charged offence is indisputable and the burden to prove all the facts undoubtedly rests on the prosecution and if there is any reasonable doubt, the accused would get the benefit of acquittal, but *"the rule gets modulated with the march of time"*. To the question whether the legislature could step in and provide exceptions, create offences and also place a part of the burden of proof on the accused, where the facts are within the special knowledge or intention is locked up in the mind of the accused, to prove the said facts is unconstitutional and violates the fundamental human rights, the Supreme Court observed that the legislature has noted the inadequacy and deficiency in the existing law and enactment of deterrent provisions is not uncommon in criminal statutes, where it is a special mode to tackle

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new situations created by human proclivity to amass wealth at the altar of human lives and it was, therefore, that a statute cannot be struck down on hypothesised individual case. The Supreme Court held that considering the large scale death and grievous hurt caused to the consumers of adulterated liquor, the amendments were introduced in order to prevent their recurrence. The power of the legislature to evolve the policy and its competence to raise presumptive evidence should be considered from this scenario.

48. In the above decision, the Supreme Court has referred in detail to various decisions from courts of comparable jurisdiction. In Salabiaku vs. France (supra) where it was held that providing exceptions or to place partial burden on the accused was not violative of the universal declaration of human rights. Presumptions of this kind were held to be a common feature of modern legislation. It was observed that it was not the letter of the language of the statute which is important, but its substance and effect is material. All the decisions that were cited on behalf of the petitioner are referred to in this decision, as for instance County Court of Ulster, New York vs. Samuel Allen [60 L.Ed. 2d. 777], Mancini vs. Director of Prosecution [(1941) 3 All E.R. 272], Jayasena vs. Reginam [(1970) 1 All E.R. 219] and George Morrison vs. People of State of California [78 L.Ed. 664].

49. The question that arose in Morrison's case (supra) was whether placing the burden of proof on a co-accused of a charge of conspiracy so as to violate the Alien Land Law of California was violative of due process under Fourteenth Amendment. Cardozo, J. Speaking for the unanimous court held that within the limits of reason and fairness, the burden of proof may be lifted from the State in criminal prosecutions and cast on a defendant. The limits are in substance these – that the State shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Special reasons are at hand to make the change permissible. The legislature may go a good way in raising a presumption or in changing the burden of proof, but there are limits. What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. Presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. Accordingly it was held that placing the burden on the accused to prove lack of guilty knowledge was held to be not violative of due process of Fourteenth Amendment. It was also held that it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. The judgment in McFarland vs. American Sugar Ref. Co. [60 L.Ed. 899] is to a similar effect.

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50. In C.S.D. Swamy vs. State [(1960) 1 SCR 461], it was held that it is permissible to shift the burden of going forward with the defendant where an inference is raised on the reasonableness adopted. It was also held that if there is reasonable nexus between the offence created and the case to be dealt with, then the procedure, the presumption and the burden of proof placed on the accused is not unjust, unfair or unreasonable, offending Articles 21 and 14; it also does not violate Article 20(3) and the Sections were, therefore, held to be valid. Applying this ratio, we may safely conclude that Section 278E of the Act does not violate Articles 14, 20(3) or 21 of the Constitution.

51. In 1965 (1) S.C.R. 123 [State of Maharashtra vs. Mayer Hans George], which dealt with the rule of presumption in the Foreign Exchange Regulation Act (FERA), it was held thus :

> *"To the question whether mens rea – in the sense of actual knowledge that the act done by the accused was contrary to the law – is requisite in respect of a contravention of S.8(1), starting with an initial prescription in favour of the need for mens rea, we have to ascertain whether the presumption is overborne by the language of the enactment, read in the light of the objects and purposes of the Act, and particularly whether the enforcement of the law and the attainment of its purpose would not be rendered futile in the event of such an ingredient being considered necessary."*

> *"The Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country. The provisions have therefore to be stringent and so framed as to prevent unauthorised and unregulated transactions which might upset the scheme underlying the controls; and in a larger context, the penal provisions are aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies."*

52. In (1974) 1 S.C.C. 167 [Pyarali K. Tejani vs. Mahadeo Ramachandra Dange], which dealt with food adulteration, the Supreme Court held that it is trite law that in food offences, strict liability is the rule not merely under the Indian Act, but all the world over. Nothing more than *actus reus* is needed where regulation of private activity in vulnerable areas like public health is intended. The Supreme Court observed as follows :

> *"Nothing more than the actus reus is needed where regulation of private activity in vulnerable likes public health is intended. In the words of Lord Wright in Mc Leod vs. Buchanan [(1940) 2 All E.R. 179, 186 (HL)], 'intention to commit a breach of statute need not be shown. The breach in fact is enough.' Social defence reasonably overpowers individual freedom to*

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injure, in special situations of strict liability."

In the above case, the constitutionality of the rules banning use of Saccharine and Cyclamate was challenged. The Supreme Court further observed thus :

> *"Constitutionality not chemistry, abuse not error, is our concern and the Executive has not transgressed limits at all here. Within the wide judge-proof areas of policy and judgment open to the government, if they make mistakes, correction is not in Court but elsewhere. That is the comity of constitutional jurisdictions in our jurisprudence.*
>
> *We are not unmindful of the possibilities of village victuallers and tiny grocers being victimised by dubious enforcement officials which may exacerbate when punishments become harsher, and the marginal hardships caused by stern sentences on unsophisticated small dealers. Every cause has its martyr and Parliament and Government - not the Court - must be disturbed over the search for solutions of these problems."*

53. What is reasonableness all about has been explained by the Supreme Court in Gurbachan Singh vs. Satpal Singh [A.I.R. 1990 S.C. 209] in the following words :

> *"There is a higher standard of proof in criminal cases than in civil cases, but there is no absolute standard in either of the cases. (See observations of Lord Denning in Bater vs. Bater, (1950) 2 All E.R. 458 @ p. 459, but the doubt must be of a reasonable man. The standard adopted must be the standard adopted by a prudent man which, of course, may vary from case to case, circumstances to circumstances. Exaggerated devotion to the rule of benefit of doubt must not nurture fanficul doubts or lingering suspicions and thereby destroy social defence."*

54. In (2004) 3 S.C.C. 753 [T. Shankar Prasad vs. State of A.P.], while dealing with Section 4 of the Prevention of Corruption Act, the Supreme Court held as follows :

> *"When the sub-section deals with legal presumption, it is to be understood as in terrorem, i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc. if the condition envisaged in the former part of the section is satisfied."*
>
> *"For the purpose of reaching one conclusion, the court can rely on a factual presumption. Unless the presumption is*

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disproved or dispelled or rebutted, the court can treat the presumption as tantamounting to proof."

55. In (2004) 9 S.C.C. 319 [State of A.P. vs. V. Vasudeva Rao], the Supreme Court had to deal with the presumption under Section 4(1) of the Prevention of Corruption Act, 1947. The space occupied by the statutory presumption insofar as the prosecution's role of discharging its burden of proof is concerned, has been explained in this case.

56. In the present case, the prosecution must prove that the assessee has failed to furnish the returns in due time, which in law he was bound to do. From the attendant circumstances and in the absence of any defence evidence to the contrary, it is open to the Court to logically infer that there must have been a wilful disregard to comply with the legal requirement. But by the introduction of Section 278E, this inference is made a presumption as to the existence of the culpable mental state on the part of the assessee. This does not mean that the Court accepts the culpable mental state as an irrebuttable fact. All that the law requires is for the person or the assessee to prove that there were circumstances which prevented him from discharging his statutory duty.

57. What is reasonable doubt has been explained in (2003) 12 S.C.C. 395 [Ramakant Rai vs. Madan Rai] in the following words :

"Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than the truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."

In (2001) 10 S.C.C. 340 [Limbaji vs. State of Maharashtra], the Supreme Court holds a presumption of fact has been held as *"..... an inference of fact drawn from another proved fact taking due note of common experience and common course of events."* The following extract from Taylor in his treatise on The Law of Evidence is very interesting :

"Thus, to borrow an apt illustration from Maule, J., if a man were to go into the London Docks quite sober, and shortly afterwards were found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stored, 'I think,' says the learned Judge — and most persons will

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probably agree with him — 'that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed'."

58. In a different context, while dealing with the Gold (Control) Act, 1968, the Supreme Court, in (2004) 7 S.C.C. 33 [Gopaldas Udhavdas Ahuja vs. Union of India], held as follows :

"The analysis of the various provisions of the 1968 Act (repealed in 1990) shows that the Act made possession of primary gold an offence. Under the Act, possession of primary gold was made an offence under Section 85(1)(ii) read with Section 8(1). The said Act provided for a special machinery for confiscation of unauthorised gold under Section 71(1) and for trial of the person concerned under Section 85 (1).

Since possession was an offence, knowledge in possession of the unauthorised article was an essential ingredient of the said offence. Where a statute forbids an act, doing of that act itself supplies the mens rea. In such a case, the prosecution need only to prove commission of the prohibited act and it is for the person concerned to bring himself within the statutory defence, which in the present case was provided for in the proviso to Section 71(1). However, in view of Section 98-B, the accused had to prove beyond reasonable doubt that he had no knowledge of the possession of the unauthorised article."

59. The provision which was challenged in 1994 Supp. (2) S.C.C. 143 [Bhanabhai Khalpabhai vs. Collector of Customs], namely Section 138-A of the Customs Act, is identical to the provision impugned herein. In that case, the Supreme Court observed thus :

"It is well known, that it is very difficult for the prosecution, to prove every link, in respect of the commission of the offence under the Act by direct evidence. The whole process of smuggling, for evading payment of custom duty consists of different links. The links aid and abate each other, sometimes through a remote control. That is why, Parliament has introduced Section 138-A in the Act.

It can be said that the provision aforesaid is an exception to the general criminal jurisprudence that onus never shifts on the accused and he has only to raise a doubt in the mind of the court, in respect of the correctness of the prosecution version. It is different from Sections 106 and 114 of the Evidence Act. In view of Section 138-A, once a

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presumption is raised about a culpable mental state on the part of the accused, that he had stored the silver ingots, to export them outside the country evading payment of custom duties, the accused has to prove as a defence that no such mental state with respect to the act charged, did exist."

60. 2006 (10) SCALE 301 [M. Nagaraj vs. Union of India] was relied on to show that the impugned provision is violative of the basic structure of the Constitution. In this judgment, the Supreme Court has approached the question from the following perspectives – Standards of judicial review of constitutional amendments, where it is observed that the point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism etc. are beyond the words of a particular provision. These principles are part of the constitutional law even if they are not expressly stated in the form of rules, and it is the principle of reasonableness which connects Articles 14, 19 and 21 and that these principles are overarching principles which provide the linking factor for the principle of fundamental rights. After dealing with the question whether equality is part of the fundamental feature of the basic structure, the concept of reservation, the extent of reservation etc., the Supreme Court asks the question whether the impugned constitutional amendments violate the principle of basic structure and goes on to hold that the criterion for determining the validity of a law is the competence of the law-making authority and that the true boundaries of the amendment process have to be seen from the content of Article 14. The constitutional principle of equality is inherent in the rule of law and it is specified when laws are applied or enforced equally, i.e., even-handedly, free of bias and without proportional distinction.

61. In Pearks, Gunston & Tee Ltd. vs. Ward [(1902) 2 K.B. 1], it was observed thus :

"..... where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty, whether he had any mens rea or not, and whether or not he intended to commit a breach of the law".

62. An offence, as we ordinarly understand it, consists of a 'how – when – where – who – why' framework. There are several stages as for instance, the intention, the planning, the preparation and the execution of the offence. Such an offence may be proved either by direct ocular

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evidence or by circumstantial evidence, where every link is in place, leading to the proof of guilt of the accused. This is not an offence like that. Many statutory offences do not fall within these parameters. Violations of the provisions of law either by doing what is forbidden or by not doing what is mandated, is the offence and the statute may also insist upon the *mens rea* element or it may not. When the element of *mens rea* is part of the statutory offence, then what follows is that the particular act of omission or commission should be done with the intention, with "knowledge", "deliberately", "without reasonable cause" or as in the case of the impugned provision, "wilfully". The prosecution cannot indiscriminately launch proceedings as was alleged on behalf of the petitioners herein without proving or without establishing that the particular act was done or a particular duty was not done. In the instant case, the alleged act is - wilful failure to furnish in due time the return of income which they are required to furnish either - (a) under sub-section (1) of Section 139 or (b) by notice given under Section 142(1)(i) or Section 148 or Section 153A. Therefore, the prosecution will have to show that the assessee or the person has not furnished the return as above in due time. The prosecution will have to prove that notice was given under Section 142(1) and yet, the return was not furnished. The prosecution will have to prove that notice was issued under Section 148, where income has escaped assessment, requiring the assessee to furnish a return of his income in the prescribed format and verified in the prescribed manner and setting forth such other particulars and there was a default. The prosecution will have to prove that a notuice was issued under Section 153A requiring the person to furnish the return of income in respcet of each assessment year falling within these assessment years referred to in clause (b) etc., as provided under the Act and there was a default. The burden of proving these lies only on the prosecution.

63. Apart from these, before the introduction of Section 278E, the prosecution also had to prove that the person or the assessee committed the above default "wilfully". Now, that responsibility has been lifted from the shoulders of the prosecution and placed on the person or the assessee. It is true that the Section says that it is for the assessee to prove the absence of culpable mental state, but what exactly does this mean? It means that the assessee will have to prove the circumstances which prevented the assessee from filing the return as above in due time as per Section 139(1) or in response to the notices under Sections 142, 148 and 153A, as the case may be. Previously, it was the duty of the prosecution to prove the absence of such circumstances. Now, if there are circumstances which prevent an assessee from discharging his duty, as provided for under the Income Tax Act, it is something specially within his knowledge and he is required to prove it. The Indian Evidence Act and the law laid down by Indian Courts as well as the Courts elsewhere with regard to proof of facts specially within the knowledge of the accused provides that the burden must necessarily be cast on that person.

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At the same time, it was, of course, vehemently contended on behalf of the petitioners that in the present case, the presumption amounts to proof of guilt and it was submitted, and with much force, that the impugned provision is a legislative presumption of guilt. I am afraid not. The law does not presume and the law has not presumed that the assessee is guilty. The law has only asked the Court to presume that nothing prevented the assessee from filing his return in accordance with law and in response to the notices and therefore, the failure is wilful. If there were such compelling circumstances, it is always open to the assessee to prove them in accordance with law. That does not seem to be and cannot be a difficult thing to do. In fact, obviously, the Parliament found that it was well nigh impossible for the prosecution to prove the absence of compelling circumstances which prevented the assessee from what in law the assessees were bound to, i.e., prove the negative, so in its wisdom, decided that it would be easier and more practicable, and in the context of the objects sought to be achieved, require the assessee to show those facts which would lead the Court to infer that act 'A', namely filing the return in due time was not possible. If the assessee proves it, then the prosecution will fail. Can it be said that this is arbitrary or unreasonable? I think not.

64. The impugned provision has been introduced to remove the weaknesses in the provisions in the direct tax laws in respect of penalties and prosecutions so as to shift the burden of proof on the assessee and to provide that once the evasion of tax is proved, the intention to evade need not be proved. The submission putforth on behalf of the petitioners was that when the object shows clearly that the amendment was with regard to evasion of tax, then the rule regarding presumption cannot be applied to Section 276CC, which does not deal with evasion of tax. To the limited extent to which we can look at the Objects and Reasons so as to throw light on the constitutionality, one would have to look at it especially since both the counsel have focussed the Court's attention on this.

65. Chapter XXI of the Act deals with penalties imposable. Chapter XXII deals with offences and prosecutions and Section 276CC finds place in Chapter XXII. Therefore, it can be seen that the object of the amendment was to remove weaknesses in the provisions both with regard to penalties and with regard to prosecution. Considering the difficulties faced by the prosecution, the element of *mens rea* was removed in certain cases, and where it continued to exist, the burden was shifted. The object was twofold, we must remember, viz. (a) to remove the weaknesses in the existing tax law provisions and (b) to provide that once the evasion of tax is proved, the intention to evade need not be proved. It is difficult to read anything in the object of the amendment extracted above to construe that Section 278E was introduced only insofar as the provisions relating to evasion of tax. The language of the Objects appear to be fairly straight forward.

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66. We can now go straight to the Section. The Section reads that in any prosecution for any offence, the culpable mental state on the part of the accused is required, the Court shall presume the existence of such mental state. The words used are *"in any prosecution for any offence"*. There is no ambiguity or doubt in these words. When that is so, it is not for us to limit the sweep of these words. The Object of the Amendment Act is quite clear. Even otherwise, when the Section itself is clear, we do not need to look elsewhere.

67. It was also contended that there could be flagrant misuse and abuse of the law. The possibility of flagrant abuse or misuse of law has never been a ground for holding a provision *ultra vires*. We cannot presume that the authorities will administer the law "with an evil eye and an unequal hand". This has been so held in several cases where the constitutionality of a legal provision was attacked. The observations of the Supreme Court in Krishna Lal's case (supra), where the Kerala Abkari Act was challenged, are squarely applicable to the present case. Merely because the Act requires the assessee to prove that there were circumstances which prevented the assessee from filing the return, it would not amount to violation of Article 20(3) of the Constitution.

68. In A.I.R. 1956 S.C. 246 [A. Thangal Kunju Musaliar vs. M. Venkatachalam Potti], which dealt with evasion of tax during war times, when Section 5(1) of the Travancore Act XIV/1124 was attacked as unconstitutional, the Supreme Court tried to ascertain the scope and purpose of the impugned Section by analysing its Preamble and then at the impugned Section itself. The condition in Section 5(1) provided that the Government must have *prima facie* reasons for believing that a person, to a substantial extent, evaded payment of tax. The powers conferred on the Commission by Section 6 and the procedure prescribed by Section 7 were clearly held to be very drastic and harsh. The Supreme Court observed, *"This unmistakably shows that the legislative authority took the view that these stringent measures were necessary for unearthing tax evasions which had gone unnoticed before, when the usual procedure under the Income Tax Law was applied"*. The Supreme Court held as follows :

> *"The question at once arises as to why it was that the legislative authority took the view that there were possible cases of tax evasion. It has been said that although the statement of the objects and reasons appended to a bill is not admissible as an aid to the construction of the Act as passed [see Aswini Kumar Ghose case – 1953 S.C.R. 1], yet it may be referred to only for the limited purpose of ascertaining the conditions prevailing at the time which necessitated the making of the law [see Subodh Gopal Bose case – 1954 S.C.R. 587]. Similar observations were made by Fazal Ali, J. with reference to legislative proceedings being relevant for the proper understanding of the circumstances under which an Act was passed and the reasons which necessitated it in Chiranjit Law*

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Chowdhuri vs. Union of India [1950 S.C.R. 869]."

69. There was good reason for the legislative authority to believe that abnormal profits were being brought into regular accounts and therefore, Section 5(1) had reference to a class of substantial evaders of income tax who required to be specially tested under the drastic procedure. As an answer to the ground that is raised in the present case, the Supreme Court, in the above case, observed that the possibility of such discriminatory treatment of persons falling within the same group or category, however, cannot necessarily invalidate this piece of legislation. It is to be presumed unless the contrary were shown that the administration of a particular law would be done not with an evil eye and unequal hand. The Supreme Court rejected thus the attack on the impugned provisions as being discriminatory and violative of the Constitution.

70. So, we see that the Supreme Court has upheld such provisions, as for instance in Krishna Lal's case (supra) and in A. Thangal Kunju Musaliar's case (supra) stating that in the background of the ground realities, it is open to the legislature to make stringent and harsh provisions to plug loopholes, which in the case on hand, was not possible if the usual procedure under the Tax Law was applied.

71. Are the words 'beyond reasonable doubt' not definite and therefore impossible for the assessee to know what exactly the words define? This question deserves to be answers in the negative outright. There is no ambiguity with regard to what the assessee has to prove – the assessee has to prove that there were reasons for not filing the retutn in due time. If he proves that, then the prosecution fails, and the manner in which the words "beyond reasonable doubt" should be construed has also been explained in various decisions; so, the non-usage of "preponderance of possibilities" cannot be a vitiating factor. It is not the doubt of a vacillating mind or a timorous mind, but if from the circumstances which are proved by the assessee that he was prevented from filing the return, then the assessee would have rebutted the presumption of culpable mental state.

72. It was also submitted on behalf of the petitioners that the offending provision renders the word 'wilfully' in Section 276CC of the Act and other such words indicating culpable mental state otiose. Such a situation would arise only if the accused was not given any opportunity to prove the lack of culpable mental state on his part. If Section 278E had been otherwise worded as to exclude the requirement of culpable mental state, then we could accept the submission that the word 'wilfully' had been rendered otiose. On the other hand, it is only because the *mens rea* is still a requisite element of the offence under Section 276CC that the legislation has required the petitioners to show that for compelling reasons, the petitioners could not file the returns in time. This itself only underscores the position that the element of *mens rea* has not been excluded because of the impugned provision.

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73. The apprehension expressed on the part of the petitioners that the prosecution will go about trigger happy, 'picking and choosing' whom to shoot down, is allayed by the mandatory requirement of sanction. Sanction is not an automatic formality and its provisions are to be observed with complete strictness. It is a weapon to ensure discouragement of a frivolous and vexatious prosecution and is a safeguard for the innocent, but not a shield for the guilty – *vide* Mansukhlal Vithaldas Chauhan vs. State of Gujarat [(1997) 7 S.C.C. 622]. This position further weakens the attack of unconstitutionality and arbitrariness.

74. While I am conscious that the mere fact that the provision impugned in these writ petitions has been in the statute book for over twenty years cannot be an answer in favour of its constitutionality, yet it is also a relevant factor in its favour, since this Section and similar other sections in the Customs Act, Foreign Exchange Regulation Act as also other such legislations have been in force all these years and there appears to have been no serious complaint of mindless and indiscriminate prosecution.

75. The decisions we have looked into show the following :

? A statute must work and every statute must be so interpreted as to make it work.

? The requirement of proof of lack of guilty knowledge would not violate the Fundamental Rights or the International Covenants.

? In the background of factual realities, it is open to the legislature to make such provisions as are necessary to plug the loopholes in order to prevent violations, if the earlier procedure was not effective.

? Presumptions are really regulations of the burden of proof and not presumptions of guilt.

? If there are certain facts, if when established would justify excuse what is *prima facie* an offence, then the onus of proving those facts obviously rests on the party accused.

? Reasonableness can be tested against the opportunity given to the defendant to rebut the presumption; retention by the Court of the power to assess the evidence; and the difficulties and the near impossibility of obtaining direct evidence by the prosecution as to the mental state of the accused in the particular context.

? There is no vagueness with regard to the words 'reasonable doubt' and the standard of reasonableness has been explained in the decisions referred to above.

? 'Reasonable' means exactly that – it should be reasonable and not

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far- fetched.

? When a statute creates a duty or a liability and a failure in this regard as an offence, then it is reasonable not to ask the prosecution to prove as part of its case, that the defendant was aware of his duty or liability.

? Proportionality should be read in the context of competence of the legislature and even-handed application insofar as proportionality of legislative power is concerned.

? Apprehension that there will be mindless and wild launching of criminal prosecution does not have any basis, since the initiation of prosecution depends on sanction; that itself is a check on such arbitrary prosecution.

? No law can be declared illegal because there is a possibility of its misuse.

? The legislature has a duty to safeguard the economic interest of the country.

? New economic activities and consequent aberrations require new penal controls and new modes of enforcement.

? The policy devised to ensure this is largely judge-proof as per the Constitutional jurisdiction except in very rare cases.

? Individual liberty does not stand alone, but it stands with morality, law, justice, common good and responsibility.

76. I, therefore, reject the attack on the constitutionality of Section 278E of the Income Tax Act, 1961. The writ petitions are dismissed. No costs. Consequently, M.P. Nos.1, 1, 1, 1 of 2006 are closed.

ab

Sd/
Asst. Registrar

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Sub Asst.Registrar

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1. The Secretary,
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2. The Commissioner of Income Tax,
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3. The Asst. Commissioner of Income Tax,
   Central Circle II(2),
   Chennai-34.

+ 4 Copies to Mr/ N. Jothi, Advocate, (SR.No.59419)

+ 1 CC to Mr.P. Wilson, Advocate (SR.No 56421)

+ One cc to Mr. K. Ramasamy Senior Special Public Prosecutor, Government of India, (SR.No.56423).

TEJ (C.O)
SG (02/12/06)

Order in
W.P. Nos.23581 to 23584 of 2006

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